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IN THE

# Supreme Court of the United States

**October Term, 1969**

**No. 848**

RONALD AMES MAYERSOHN,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## REPLY BRIEF OF PETITIONER MAYERSOHN

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The Government does not dispute that, if the prosecutor had access to petitioner's confidential statements to the probation officer and used them in cross-examining petitioner, a serious violation of petitioner's rights resulted, with broad statutory and constitutional implications. Its efforts in its Brief in Opposition to avoid coming to grips with this issue is a masterpiece of casuistry. First, it very subtly equates access with a reading of the probation report itself. Then, suggesting for the first time that this issue was not properly raised below, the Government informs us that post-Petition investigation reveals that the prosecutor did not, in fact, have access to the probation report and thus no violation occurred. The argument fails, not only because it is logically unsound, but because it wholly ignores a portion of the certified record which destroys its factual premise.

1. Contrary to the Government's contention, the issue in this case does not hinge upon whether or not the prosecuting attorney actually *saw* the probation officer's pre-

sentence report. What petitioner has consistently contended is that a statement given by him in confidence to the Probation Office was revealed to the Office of the United States Attorney and then used against him at trial in securing his conviction. The manner in which such statement was obtained by the prosecution, whether it was in the form of a response to oral inquiries of the probation officer, or by a reading of the report prepared by him, is beside the point. Obviously, the evil was accomplished regardless of the means employed.

2. The Government tries to side-step the issue inherent in such prosecutorial misconduct by the simple expedient of alleging, for the first time, that such misconduct did not occur.* Well aware that in arguing the case before the Court of Appeals the Government assumed the very misconduct it now denies, the Government argues that since the issue was not properly raised below, the prosecuting attorney who tried the case was never afforded an opportunity, on the record, to affirm or deny his improper access to the confidential information. The patent inaccuracy of this misrepresentation is apparent from a reading of that portion of the record below containing petitioner's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.**

The Government was represented in the trial court on this motion by the very same prosecuting attorney who had tried the case. Defense counsel, in unsuccessfully urging that the prosecutor's cross-examination of petitioner

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* Notably the Government's denial is more significant for what it leaves unsaid than for what it claims did not occur. The Government artfully couches its denial in terms of the prosecutor *not seeing the probation report* but carefully refrains from denying that the prosecuting attorney was *told* by the probation officer of petitioner's statement to him (Brief in Opposition, at 5).

** This portion of the trial record was filed in this Court as part of the certified record and is contained in a transcript dated December 20, 1968.

Mayersohn concerning statements made by petitioner to Probation Officer Mundy was grounds for a new trial, stated (transcript of Dec. 20, 1968, at 12-13):

> ". . . it was a direct violation of the statute, of Rule 32(c) of the Federal Rules of Criminal Procedure, which restricts in the most careful way the circumstances in which a probation officer may be disclosed to anyone. There are no cases because I suppose it never occurred before—certainly it never occurred before in my experience *where a probation officer's statement elicited from a Defendant awaiting possible sentence was turned over to a prosecutor for use on the trial of that Defendant.*" (Emphasis added.)

The record of those proceedings will be searched in vain for the prosecuting attorney's denial of this crystal-clear allegation of improper conduct on his part. Instead, he chose to remain silent, never disputing the precise fact which defense counsel, the Court of Appeals and we, in our Petition to this Court, properly assumed to be true. It now ill behooves the Government to seek to avoid the consequences of its tacit admission in the trial court and to dispute, by unsworn hearsay, the factual premise upon which it argued the issue in the Court of Appeals.*

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* In view of the prosecutor's specificity in cross-examining petitioner (Petition, at 7-8), and his admitted practice of speaking to probation officers about these cases (Brief in Opposition, at 6n), it strains credulity to accept, as the Government does, his gratuitous assertion that his questioning of petitioner was based on nothing more than a calculated guess as to what Mayersohn may have said to Probation Officer Mundy.

Moreover, it is perfectly clear from the opinion of the Court of Appeals that their decision was premised on the fact that the prosecutor had cross-examined petitioner Mayersohn on the basis of information obtained by him from Probation Officer Mundy, as shown by that Court's statement that "the use of this information [by the prosecutor] was improper under Rule 32(c) of the Federal Rules of Criminal Procedure" (Appendix A, at 5a; 413 F2d at 643).

3. It is highly significant that the Government concedes that probation officers do disclose to prosecutors confidential information secured by them from defendants in the course of preparing presentence reports (Brief in Opposition, at 6n). The Government treats this admission as if wholly unaware that it renders meaningless the assertion that probation officers do not make "probation reports" available to the prosecution, although it does explain why the Government so carefully casts its disclaimer solely in terms of access to the probation report itself. Nor does the Government deem it necessary to address itself to the propriety of such disclosures insofar as the rights of those defendants are concerned (see Petition, at 15-17). Nothing more strongly reinforces our position that this Court should direct its attention to the unholy relationship between probation officers and prosecutors than the conduct admitted by the Government in its Brief in Opposition.

4. The facts of the instant case squarely present for resolution by this Court the issue raised in the Petition, namely, the viability of the principle of confidentiality embodied in Rule 32(c) and the constitutional implications of sanctioning prosecutorial access to confidential information obtained by probation officers from defendants. It is not petitioner who has endowed the issue with its statutory and constitutional dimension. This flows directly from the decision of the Court of Appeals which impliedly condones a practice whereby the Federal Probation Office, an arm of the judiciary, is permitted to act as an investigative arm of the prosecution by making available to the latter, for use at trial, confidential information obtained from defendants. In view of the highly sensitive function performed by the Probation Office in our system of criminal justice, it is difficult to understand why the Government does not consider the compromising of that Office's integrity of sufficient importance even to warrant discussion. Its efforts to avoid this issue by simply denying its existence, and in less than ingenuous fashion at that, is truly a disservice to this Court.

## CONCLUSION

**For the foregoing reasons and those stated in our Petition, the Petition for a Writ of Certiorari should be granted.**

Respectfully submitted,

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